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No. 80-1941

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HARREL LLOYD ROBINSON, JR. - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether Petitioner's Sixth Amendment rights to a fair and impartial trial, to effective assistance of counsel, and to confront his accusers were violated when the trial judge refused to voir dire prospective jurors, in a marijuana case, concerning whether they or any member of their family had had bad experiences with marijuana or other drugs, refused to permit Petitioner in his own trial to be present in chambers for arguments touching on his defense, and refused to permit Petitioner to cross-examine his accusers concerning the fact that serious criminal charges had been dismissed against them in exchange for their testimony.

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IN THE

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No.

HARREL LLOYD ROBINSON, JR. - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Harrel Lloyd Robinson, Jr., by and through his counsel, Edwin F. Kagin, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit was entered on March 17, 1981 (see Appendix, pp. 11-12). No opinion was reported. The judgment of the United States District Court for the Western District of Kentucky was entered December 7, 1979, pursuant to a jury verdict of guilty of conspiracy to traffic in marijuana that same date.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered March 17, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §1254(1).

QUESTION PRESENTED

Whether Petitioner's Sixth Amendment rights to a fair and impartial trial, to effective assistance of counsel, and to confront his accusers were violated when the trial judge refused to voir dire prospective jurors, in a marijuana case, concerning whether they or any member of their family had had bad experiences with marijuana or other drugs, refused to permit Petitioner in his own trial to be present in chambers for arguments touching on his defense, and refused to permit Petitioner to cross-examine his accusers concerning the fact that serious criminal charges had been dismissed against them in exchange for their testimony.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT SIX

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

F.R.Cr.P 43 (a)

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

F.R.Cr.P 43 (c)(3)

(c) Presence Not Required. A defendant need not be present in the following situations:

(3) At a conference or argument upon a question of law.

STATEMENT OF THE CASE

This is a petition that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered March 17, 1981, affirming the criminal conviction of the Petitioner herein in the United States District Court for the Western District of Kentucky.

On March 26, 1979, after a lengthy investigation, the United States indicted sixteen people for conspiracy to traffic in marijuana (21 U.S.C. § 846), and five of these sixteen for operation of continuing criminal enterprise (21 U.S.C. § 848), namely marijuana smuggling operations.

The Court severed trial of those charged with operation of a continuing criminal enterprise from the remaining defendants.

Most of the defendants pled guilty; two had the charges against them dismissed.

The Petitioner, Harrel Lloyd Robinson, Jr., under indictment for both conspiracy and operation of continuing criminal enterprise, was the only defendant to stand trial. His trial began on December 3, 1979, in the United States District Court for the Western District of Kentucky, at Louisville, the Honorable Thomas A. Ballantine, Jr., presiding, and lasted for five days. A jury verdict of guilty was returned on December 7, 1979, as to the conspiracy count; the jury hung as to the continuing criminal enterprise count, and the Court declared a mistrial as to it.

The Petitioner was immediately sentenced to serve a period of five years in a federal penetentiary and a special parole term of four years. The Petitioner was refused probation.

After timely motion for a new trial was denied, appeal to the United States Court of Appeals for the Sixth Circuit was taken. That Court, by order entered March 17, 1981, directed that the lower court's judgment of conviction be affirmed.

It is in this posture that the Petitioner, by counsel, submits his cause to this most Honorable Tribunal, and respectfully prays that the writ issue.

REASON FOR GRANTING THE WRIT

The reasons for granting the writ are predicated upon the denial of rights guaranteed by the Sixth Amendment to the United States Constitution. They are three in number; each being of sufficient Constitutional magnitude to have caused the Petitioner sub-

stantial prejudice and warrant reversal of the conviction below.

FIRST, the Petitioner's Sixth Amendment right to a fair and impartial jury was denied him when, during voir dire, the trial judge refused to ask of prospective jurors, the following question, *or any similar question*[1], tendered by defense counsel:

> "Have you, or any of your family, had bad experiences with drugs?"

The Petitioner was charged with a drug violation involving marijuana and faced severe criminal sanctions if convicted. In light of the wide range of attitudes prevalent within any community concerning marijuana and its usage, fairness would mandate that the backgrounds, biases, attitudes and perceptions of veniremen who might hear such a case be adequately subjected to defense scrutiny for the purpose of ferreting out possible prejudices. Only then could defense counsel intelligently challenge jurors and impanel a fair and impartial jury.

The case at hand is readily analogous to the situation presented in *United States* v. *Poole,* 450 F. 2d 1083 (3rd Cir. 1971). There a conviction for armed bank robbery was reversed and remanded when the trial court refused to ask on voir dire the tendered question:

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[1]See *United States* v. *Dellinger,* 472 F. 2d at 370, where the Court points out that it is essential to explore the backgrounds and attitudes of the jurors in order to discover actual bias or cause.

"Have you or any member of your family ever been the victim of a robbery or other crime?"

The opinion stands for the proposition that a Defendant has the right to probe for bias that could affect a juror's objectivity stemming either from his personal experience as a crime victim, or as a member of a victimized family. See also *Kuzniak* v. *Taylor Supply Company,* 471 F. 2d 702 (6th Cir., 1972).

The Court here had the duty to insure that the subject of drug experiences was properly put before the prospective jurors. Instead, the trial judge conducted at best a perfunctory voir dire examination. His severe restriction of the voir dire denied the Petitioner access to sensitive areas of the veniremen's true perceptions, and may well have curtailed his challenges for cause, and/or failed to provide him with reasonable guidance in exercising pre-emptory challenges. *United States* v. *Dellinger, supra.* This abuse of judicial discretion denied the Petitioner his Sixth Amendment right to an impartial jury. Accordingly, the Petitioner's conviction must be reversed and the cause remanded.

SECOND, the Petitioner was convicted solely upon the uncorroborated testimony of accomplices, some of whom the Government had agreed to dismiss charges of engaging in continuing criminal enterprises against in exchange for their testimony. By pretrial order, the Court prohibited defense counsel from eliciting any mention of the stiff mandatory penalty associated

with that charge.[2] In so doing, the Court effectively emasculated the Petitioner's defense by preventing him from developing on cross-examination the motives of the witnesses who testified against him.[3] The jury was thus denied the necessary facts from which one could properly draw inferences relative to a witness's credibility. *Sandroff* v. *United States,* 158 F. 2d 623 (6th Cir., 1946).

This was grievous error. Wide latitude should be allowed in cross-examination, *United States* v. *Masino,* 275 F. 2d 129, 132 (2nd Cir., 1960), especially when the principle witnesses appearing in behalf of the prosecution . . . are accomplices to the crime charged. *Id.,* at 133. See also, *United States* v. *McCallie,* 554 F. 2d 770, 772 (6th Cir., 1977).

This was not a situation where either side wished to make a penalty known to the jury *solely* for the effect that such knowledge would have upon the jury. That, Petitioner agrees, would be improper. Here, Petitioner merely sought to elicit the motives of witnesses who were to testify against him. He was precluded from doing that by the Court's ruling. Therefore, the Court violated his Sixth Amendment right to confront his accusers and his conviction must be reversed.

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[2]Conviction of 21 U.S.C. §848 carries a minimum of ten years to serve without eligibility of probation or parole.

[3]It takes no great imagination to deduce that avoidance of that penalty would supply a strong motive to testify in behalf of the Government against another person,

THIRD, before trial, the Petitioner requested that he be allowed to be present in chambers during conferences. His request was denied. This ruling by the Court violated a substansive right enjoyed by the Petitioner and was reversible error. It flies in the face of F.R.Cr.P 43(a) and (c)(3) and violates the Sixth Amendment guarantee to an accused of assistance of counsel for his defense.

F.R.Cr.P 43(a) mandates the presence of an accused "at every stage of the trial." F.R.Cr.P 43 (c) (3) provides that "A defendant need not be present at a conference or argument upon a question of law." Petitioner submits that the plain language of F.R.Cr.P 43 (a) and (c)(3) authorize his presence in chambers *when he requests it.* F.R.Cr.P 43 (c) (3) does not require a defendant's presence in chambers, *nor does it prohibit such presence.* By using the words "need not be present," the plain import of the rule is that the defendant does not have to be present at argument in chambers, but that he may be present. If he may be present, the logical conclusion is that he may be present if he requests it. Since the Petitioner herein requested that he be present at proceedings in chambers, the Court's denial of that request was error. Any other reading of F.R.Cr.P 43 (c)(3) would violate the Petitioner's Sixth Amendment right to be present during his trial and to the assistance of counsel.

Moreover, one accused of a crime has the absolute right to be in charge of the conduct of his own defense, *Faretta* v. *California,* 442 U. S. 806, 819 (1975), together with the right to be assisted by counsel. *Id.*

Important decisions concerning evidence and trial procedure are made in chambers. Frequently decisions made in chambers control the outcome of the case. An accused who is not present in chambers cannot control the conduct of his defense. In addition, if the accused is not present in chambers, he can neither assess the effectiveness of the assistance rendered to him by his counsel, nor impart directions to his counsel. This he has the right to do. *United States* v. *Bryant*, 545 F. 2d 1035 (6th Cir., 1976). When a right of such magnitude is denied, the Petitioner need not show prejudice.

The Petitioner herein sought only that which F.R.Cr.P 43 (a) and (c)(3) and the Sixth Amendment to the United States Constitution provide to him—namely, that he be present at proceedings in chambers when he specifically requests such participation. His exclusion from such proceedings after he requested participation was error.

CONCLUSION

For the foregoing reasons, the petitioner herein respectfully prays that the writ issue.

Respectfully submitted,

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APPENDIX

80-5014

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRELL LLOYD ROBINSON - - - *Defendant-Appellant*

v.

UNITED STATES OF AMERICA - - - *Plaintiff-Appellee*

ORDER—Filed March 17, 1981

Before: EDWARDS, Chief Judge, BROWN, Circuit Judge and BATTISTI,* District Judge.

Appellant was convicted on a charge of conspiracy to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and after a jury trial, was sentenced to five years in the federal penitentiary plus a special parole term of four years.

On appeal, counsel on his behalf urges with great vigor that the District Judge abused his discretion in refusing to submit a specific question to prospective jurors on voir dire and in refusing to permit defense counsel to question government witnesses (who had been accomplices of his) concerning the fact that as to them, the government had dismissed a charge under 21 U.S.C. § 848 of participating in a continuing criminal enterprise, which charge carried on conviction a mandatory 10-year sentence.

As to the first of these questions, we have reviewed the question sought to be asked and agree with the District

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*Honorable Frank J. Battisti, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Court's ruling. To the extent the question of prior prejudice on the part of jurors concerning illegal drugs was relevant, we believe it was properly explored by the questions the District Judge did ask. As to the mandatory sentence issue, we see no occasion on this record for the District Judge to have deviated from the general rule against revealing to the jury the punishment provided by statute for particular offenses. *See United States* v. *Davidson*, 367 F. 2d 60, 63-64 (6th Cir. 1966). No other issues of any merit have been presented, the judgment of conviction is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

OFFENSES

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§ 848. Continuing criminal enterprise

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 of the United States Code and the Act of July 15, 1932 (D. C. Code, secs. 24-203–24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.